

USING AMERICAN ANTITRUST TO INTERPRET COSTA RICAN COMPETITION LAW

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Of course I know, and every other sensible man knows,
that the Sherman law is damned nonsense, but if my
country wants to go to hell, I am here to help it.

Justice Oliver Wendell Holmes, Jr.

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I. INTRODUCTION: COMPETITION AND THE ROLE OF ANTITRUST LAW

In the model of perfect competition, the market is so populated by sellers and buyers that no one individual can influence the market price through the manipulation of input or output. "All relevant prices are known to each producer, who also knows of all input combinations technically capable of producing any specific combination of outputs and who makes input-output decisions solely to maximize profits."¹ All individuals are price takers. Producers maximize their profits by producing at a level where their marginal cost equals their average market cost.

However, markets fail. Markets have imperfections. Individuals do not always know whether the price of an item at the store on the corner is the same as the one next door. In fact, the price of an item is usually lower at a megastore due to economies of scale. There are also social costs for certain activities and different government tax rates. Products are not really homogenous, and advertisements make a difference. Government protectionism and artificial barriers exist.

Firms accumulate market power because "[m]arket forces are [not] sufficiently strong, self correcting and well directed to guarantee the results that perfect competition would bring."² This type of market failure is due to a monopoly or to an oligopoly. A monopoly or oligopoly exists when a single firm or just a few firms produce a product with no close substitutes. These firms are no longer price takers. Rather, they maximize their profits by looking for the most convenient price. Firms which produce at a level where marginal revenue and marginal cost equal average cost are able to sell their products at a higher price than where the market offer intersects the demand curve.

Correspondingly, governments intervene in the market using antitrust laws and agencies to correct the above mentioned market failures. These competition laws address two problems arising from too much market power, "the inefficient allocation of resources and the unfair distribution of the gains from exchange."³

1. PHILIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS, PROBLEMS, TEXTS, CASES* 8 (4th ed. 1981).

2. *Id.* at 13.

3. Louis De Alesi, *The Public-Choice Model of Antitrust Enforcement*, in *THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE* 192 (Fred S. McChesney et al. eds., 1995).

Countries like Costa Rica have just enacted competition laws⁴. Based on the experience of the United States, this article tries to explain how certain parts of Costa Rican competition law should be interpreted and provide reasons for the suggested interpretation.

This article follows the path of the United States Sherman and Clayton Antitrust Acts and the ensuing case law. The judicial decisions which will be cited correspond to those studied in the 1995-1996 fall Antitrust Law course taught at Harvard Law School by Professor Louis Kaplow. Currently, only two cases have been filed with the Costa Rican Commission. They have not yet been decided, and the Commission has not initiated any investigations ex-officio. Thus, no Costa Rican judicial or administrative decision has been produced.

II. ARTICLE 11: ABSOLUTE MONOPOLISTIC PRACTICES

Absolute monopolistic practices consist of those actions, contracts, agreements, arrangements, or combinations among economic competitors whose purposes are the following:

- a) fixing, raising, and manipulating the selling or purchasing price of goods or services in the market, or exchanging information with the same purpose or consequence [hereinafter referred to as the *price provision*].
- b) establishing the obligation to produce, process, distribute, or commercialize only a restricted or limited quantity of goods or rendering a number, volume, or a restricted or limited frequency of services [hereinafter referred to as the *quota provision*].
- c) dividing, distributing, allocating, or imposing parts of present or future markets of goods and services through customers, suppliers, space, or time [hereinafter referred to as the *allocation of markets provision*].
- d) establishing, or coordinating the participation in bids, auction sales, or the abstention thereof. In the application of this provision, the Commission shall control ex-officio or per request those markets with few suppliers. The practices referred to in this provision shall be null and void and the economic agents participating in those practices shall be sanctioned in conformity with this law [hereinafter referred to as the *cooperation of bids provision*].⁵

4. Ley de Promoción de la Competencia y Defensa Efectiva del Consumidor [P.C.D.E.C.], no. 7472, 19 Dec. 1994, art. 10 (Costa Rica) (translation to English by the writer).

5. P.C.D.E.C. art. 11 (Costa Rico).

A. The Scope of Monopolistic Practices

Although article 11 of the P.C.D.E.C. refers to *monopolistic practices*, it does not regulate monopolies or the acts of monopolies.⁶ It does not regulate individual conduct, regardless of whether it causes an undue restraint on competition.⁷ All the activities described in subparagraphs (a) through (d) of article 11 require the cooperation of a minimum of two parties. The party's actions should be the product of "actions, contracts, agreements, arrangements or combinations *among economic competitors*."⁸ (emphasis added).

Article 11 regulates oligopolies which cause an undue restraint on competition, as does section 1 of the United States Sherman Antitrust Act. The Sherman Antitrust Act provides that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."⁹

Neither article 11 nor section 1 expressly refer to oligopolies. However, in order to cause an undue restraint of competition, the activities must be taken by oligopolies under both provisions.¹⁰

An oligopoly is simply defined as a monopoly shared by relatively few firms which recognize their interdependence and act in accordance with such interdependence.¹¹ Areeda and Kaplow mention four key elements for an oligopoly to be successful.¹² For the purposes of this paper, these elements will be deemed to be the core of *acting in accordance with such interdependence*. The four elements are as follows:

- 1) A consensus on price needs to be reached. Differences in costs have to be disregarded. A floor price will be set by the least efficient firm. In any case, since the level of production will be set at the point where marginal revenue and marginal cost equal average cost, firms will be able to sell at a price higher than where the market offer and demand curves intersect each other. In order for a consensus on

6. P.C.D.E.C. art. 11 (Costa Rica).

7. P.C.D.E.C. art. 11 (Costa Rica).

8. P.C.D.E.C. art. 11 (Costa Rica).

9. P.C.D.E.C. art. 11 (Costa Rica).

10. P.C.D.E.C. art. 11 (Costa Rica); Sherman Antitrust Act of 1890, 15 U.S.C. § 1 (1980).

11. See generally 6 PHILIP AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (1985); Donald Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962); Richard Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969).

12. AREEDA & KAPLOW, *supra* note 1, at 278.

prices to be reached, channels of communications must be available and used. Communication may be formal or informal.

- 2) Firms must be able to compare their own prices vis-a-vis other firms prices, quality, and promotions.
- 3) Cheating must be detectable and punishable.
- 4) Lastly, but of great importance, producers must collectively enjoy market power.

Correspondingly, article 11 is only applicable to oligopolies which enter into contracts which unduly restrict competition. Under Costa Rican law, if an action is brought against a party which is not an oligopoly, or against an oligopoly which is not cooperating with another oligopoly to restrict competition, then the action should be dismissed. In order to determine whether a firm is a part of an oligopoly, the above elements need to be jointly taken into account.¹³

B. Meaning of Agreement

Article 11 deals with actions, contracts, agreements, arrangements, or combinations among economic competitors.¹⁴ Its wording is similar to that of section 1.¹⁵ A written agreement among competitors to unduly restrain competition for their own benefit is clearly illegal under United States and Costa Rican law.¹⁶ However, problems do arise when establishing the existence of a tacit or inferred agreement.

United States case law has concluded that mere parallelism in competitive behavior is not an antitrust violation. In *Theater Enterprises v. Paramount Film Distributing Corp.*, common conduct among the respondents was found to exist. They uniformly rebuffed Petitioner's request to obtain first-run features for its theater.¹⁷ Did Respondent's refusals to Petitioner's request stem from independent decision or from a tacit agreement? The court answered that:

[B]usiness behavior is admissible circumstantial evidence from which the fact finder may infer agreement. . . . But this Court has never held that a proof of parallel business behavior establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior

13. P.C.D.E.C. art. 11 (Costa Rica).

14. P.C.D.E.C. art. 11 (Costa Rica).

15. P.C.D.E.C. art. 11 (Costa Rica).

16. P.C.D.E.C. art. 11 (Costa Rica); Sherman Antitrust Act, 15 U.S.C. § 1 (1890).

17. *Theater Enter. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954).

may have made heavy inroads into the traditional judicial attitude toward conspiracy, but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.¹⁸

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the plaintiffs alleged that the defendants conspired to charge unduly low prices. Even in the presence of a reason to conspire, the Court could not establish the existence of an agreement without an inference of actual conspiracy.¹⁹ Thus, parallel conduct and some other factors would be required in the United States to determine whether a tacit or inferred agreement exists.²⁰

For instance, in *American Tobacco Co. v. United States* the parallel behavior was accompanied by evidence that the related price increase occurred in spite of decreasing input prices. Additionally, Respondents could not offer any explanation as to why prices across the industry increased while costs decreased.²¹

In *Eastern States Retail Lumber Dealers' Association v. United States*, the Court held that:

[C]onspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when in this case by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the association, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.²²

Thus, the retailer's decision not to purchase was not independent; it was the product of agreement materialized in the circulated list of offenders.

The factors required in order to determine whether an agreement exists have not been clearly defined by United States courts. However, the decisions cited above provide some guidance. Some considerations that may be taken into account are as follows:

- a. Sudden across-the-industry unexpected change of behavior.
- b. "a" is not reasonably explained by other factors.

18. *Id.* at 541.

19. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1946).

20. "The other facts that serve to transform parallelism into conspiracy . . . are often characterized as 'plus factors.'" AREEDA & KAPLOW, *supra* note 1, at 308.

21. *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

22. *Eastern States Retail Lumber Ass'n v. United States*, 234 U.S. 600, 609, 612 (1914).

- c. "a" involves risk.
- d. A benefit (and hence a motive) would be derived from "a." (as long as it is across-the industry).
- e. All the four elements required for the existence of an oligopoly detailed under "1." above are present.

Hence, under United States law, given the above circumstances in a degree which may allow a reasonable inference, it is possible for a fact finder to determine that an agreement exists even though there is no written agreement, proof of conversations, or exchange of documents.

Nevertheless, for such a determination to be made certain economic conditions of the relevant market should exist. Since the potential gains from collusion are determined by the elasticity of demand,²³

[in] cases of alleged or suspected [tacit] collusion, it will be possible to make a threshold judgment as to whether the conditions in the market indicate that the elasticity of demand at the competitive price is probably so high that collusive pricing would be an unprofitable strategy to follow even if it were costless to collude. Such a judgment will help the enforcement agencies to allocate their resources intelligently and avoid the pursuit of shadows and chimeras, which unfortunately is a very large part of the antitrust enforcement today.²⁴

Posner lists the economic conditions favorable to monopolistic collusion: a market concentrated with few sellers; there are no sellers on the fringe of the market; inelastic demand at a competitive price; entry into the market is very difficult; product standardization; the principal firms sell at the same level in the chain of distribution; price is more important than other forms of competition; a high ratio of fixed to variable costs; and whether demand is static or declining over time.²⁵

The burden of proof, of course, lies with the plaintiff. Additionally, in accordance with *Matsushita Electronic Indus. Co.*, the plaintiff must present evidence "that tends to exclude the possibility that the alleged conspirators acted independently."²⁶ Therefore, the plaintiff

23. The elasticity of demand may be defined as the percentage change in quantity demanded as a result of a one percent change in price.

24. RICHARD A. POSNER, *ANTITRUST LAW, AN ECONOMIC PERSPECTIVE* 50 (1976).

25. *Id.* at 55. The less standardized a product is, the more difficult it will be for the sellers of the product to collude effectively.

26. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1946) (citing *Monsanto Co. v. Spry-Rite Service Corp.*, 465 U.S. 752 (1984)).

must first submit evidence on the existence of an inferred agreement relying on the factors above, and then exclude the possibility of non-conspiratorial action.

Under Costa Rican law, the threshold would be stricter. Article 11 encompasses express and tacit agreements, although it does not encompass inferred agreements.²⁷ Agreements do not need to be written down in order to meet the threshold.²⁸ However, sufficient proof as to the actual existence of the agreement would be required, such as minutes of meetings, telephone conversations, exchange of documents to the effect, etc.²⁹ Additionally, economic conditions favorable for the existence of such agreement should exist because in their absence the existence of an agreement to collude is very unlikely. It would just not be profitable. Finally, as in the United States, the burden of proof would lie with the plaintiff.³⁰

C. *The price provision of article 11*

The price provision of article 11 of the Costa Rican competition law prohibits the following two practices:³¹ 1) fixing, raising, manipulating the selling or purchasing price of goods or services in the market [hereinafter generally referred to as *price fixing*],³² and 2) exchanging information with the same purpose or consequence.³³

Each prohibition deserves a separate and independent analysis which follows.

1. Price fixing

Price fixing may be beneficial not only for the parties engaging in it, but also for other groups, society and the free market. An ensuing conclusion from the above statement is that price fixing is not always detrimental and should not always be illegal.

Legal and notary fees in Costa Rica are set by a statute.³⁴ A top of the line attorney should charge the same for a two million colones law suit

27. P.C.D.E.C. art. 11 (Costa Rica).

28. P.C.D.E.C. art. 11 (Costa Rica).

29. P.C.D.E.C. art. 11 (Costa Rica).

30. P.C.D.E.C. art. 11 (Costa Rica).

31. P.C.D.E.C. art. 11 (Costa Rica).

32. P.C.D.E.C. art. 11 (Costa Rica).

33. P.C.D.E.C. art. 11 (Costa Rica).

34. P.C.D.E.C. art. 11 (Costa Rica).

as a freshman attorney who has just graduated from law school. Would such a statute be illegal?

In *Goldfarb v. Virginia State Bar*, the United States Supreme Court found a county bar association's legal services scheduling of minimum fees to be illegal.³⁵ Although, it did so only because the state court had not specifically required it.³⁶ Had the schedule been required by the state, it would have likely been found to be legal. However, the Court did hold although a bar association's rule prescribing minimum fees for legal services violated section 1 of the Sherman Antitrust Act, certain practices by members of a learned profession might survive scrutiny under the rule of reason even though those practices would be viewed as a violation of the Sherman Antitrust Act in another context.³⁷

Correspondingly, in general, safety or ethical standards may provide an acceptable justification for fixing prices.³⁸ A code of ethics of a learned profession may impose reasonable standards.³⁹ In certain cases, blunt competition among professionals (engineers, doctors, etc.) may be contrary to the public interest.⁴⁰ Without such standards, professionals may opt for cheaper and inefficient instruments or methods of operating. These competitive pressures to offer services at the lowest price would adversely affect quality. Awarding contracts to the lowest bidder, regardless of quality, could be dangerous to public health, safety, and welfare.⁴¹ In *National Society of Professional Engineers v. United States*, the Court held that:

[w]e adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason.⁴²

The Court further acknowledged in footnote twenty-two that:

35. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790 (1975).

36. *Id.* at 790.

37. *Id.* at 792.

38. *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (extracted from arguments unsuccessfully put forth by petitioners).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 696.

Courts have, for instance, upheld marketing restraints related to the safety of a product, provided that they have no anticompetitive effect and that they are reasonably ancillary to the seller's main purpose of protecting the public from harm or itself from product liability. (See, e.g. *Tripoli Co. v. Wella Corp.*, 425 F. 2d. 932 (3d Cir. 1970) (en banc).⁴³

Likewise, joint ventures and strategic alliances entered into by competitors are not necessarily illegal. In *United States v. Joint Traffic Assn.*, the Court decided that the formation of corporations and partnerships and appointments of joint sales agents and leases have never been understood to be a restraint of trade as that term is legally defined.⁴⁴ In *Broadcast Music v. Columbia Broadcasting System*, the Court stated that joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price fixing schemes where the agreement on price is necessary to market the product at all.⁴⁵ Other possible, reasonable, and judicially accepted justifications for agreements fixing prices are "the integration of sales, monitoring and enforcement against unauthorized copyright use," the improvement of efficiency, the reduction of costs, and the consequential creation of a new product or of a new market.⁴⁶

In *Broadcast Music*, the question was whether the issuance of blanket licenses to copyright musical compositions at fees negotiated by them was *per se* illegal under the antitrust laws.⁴⁷ The Court found that the alleged practices were reasonable and that a careful analysis of the facts was appropriate in order to determine their legality (or their lack thereof).⁴⁸

It is interesting to note that the District Court, though denying summary judgment to certain defendants, had ruled that the practices did not fall under the *per se* rule, and second, after an eight-week trial the dismissal of the complaint inasmuch as negotiation of *Broadcast Music* with individual copy right owners was available and feasible.⁴⁹

43. *Id.* at 696 n.22.

44. *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898).

45. *Broadcast Music v. Columbia Broadcast Sys.*, 441 U.S. 1 (1979). See generally *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 179 (1964); *United States v. E.I. du Pont de Nemours*, 353 U.S. 586, 607 (1957).

46. *Broadcast Music*, 441 U.S. at 20.

47. *Id.* at 4.

48. *Id.* at 2.

49. *Columbia Broadcasting Sys., Inc. v. American Soc'y of Composers*, 400 F. Supp. 737 (1975).

The Supreme Court itself justified price fixing by accepting an efficiencies argument,

But even for television network licenses, . . . [ASCAP] *reduces costs* absolutely by creating a blanket license that is sold only a few, instead of thousands, of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they paid for. [ASCAP] . . . also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses. Moreover, a bulk license of some type is a necessary consequence of the integration *necessary to achieve these efficiencies*, and a necessary consequence of an aggregate license is that its price must be established. . . . This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here the whole is truly greater than the sum of its parts; it is, to some extent, a *different product* . . . [Broadcast Music], in short, *made a market* in which individual composers are inherently unable to compete fully effectively.⁵⁰

Furthermore, the Court in note forty of its opinion stated that, "because of the nature of the product . . . a composition can be simultaneously, consumed, by many users . . . composers have numerous incentives to produce, so the blanket license is unlikely to cause decreased output, one of the normal undesirable effects of a cartel."⁵¹

Correspondingly, the Supreme Court remanded the case for further proceedings to consider any unresolved issues that CBS may have properly brought to the Court of Appeals.⁵² More important, however, is the fact that on remand the original district court decision was affirmed, thereby concluding that the analyzed price fixing was justified, and, therefore, legal.⁵³

50. *Broadcast Music*, 441 U.S. at 21.

51. *Id.* at 22 n.40.

52. *Id.* at 25.

53. *CBS v. American Soc'y of Composers*, 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981).

After the *Broadcast Music* decision, the Supreme Court confirmed that not every price fixing agreement is necessarily illegal.⁵⁴ In *National Collegiate Athletic Association (NCAA) v. Board of Regents of the University of Oklahoma*, the Court reviewed a plan adopted in 1981 for the 1982-1985 seasons intended to reduce the adverse effects of live television upon football game attendance.⁵⁵ Also in 1981, the College Football Association (CFA) obtained an alternate plan from National Broadcasting Co. (NBC), "which would have allowed more liberal number of appearances for each college [part of the CFA], and would have increased the overall revenues realized by CFA members. In response the NCAA publicly announced that it would take disciplinary action against any CFA member that complied with CFA-NBC contract."⁵⁶

In fact, the NCAA created a, horizontal restraint - an agreement among competitors on the way in which they will compete with one another. A restraint of this type has often been held to be unreasonable as a matter of law. Because it places a ceiling on the number of games member institutions may televise, the horizontal agreement places an artificial limit on the quantity of televised football games that is available to broadcasters and consumers. By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output. . . .⁵⁷

Nevertheless, the NCAA put forth a series of explanations to its plan. After a careful analysis of all of them, the Court verified that justifications may be invoked and, if applicable, in due course accepted: "[*Broadcast Music*] squarely holds that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive. Similarly, as we indicated in *Sylvania*, a restraint in a limited aspect of a market may actually enhance marketwide competition."⁵⁸

Finally, the Court concluded that

54. *Broadcast Music*, 441 U.S. at 24.

55. *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984).

56. *Id.* at 95.

57. *Id.* at 99.

58. *Id.* at 103.

[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.⁵⁹

Most recently a price fixing agreement among Ivy League Universities was held to be legal. In *United States v. Brown*, the Court applying a *rule of reason* analysis, and for social welfare reasons, found an agreement among the Massachusetts Institute of Technology and eight other Ivy League schools to be legal.⁶⁰

In short, price fixing arrangements may be legal. Under United States law, justifications put forth by defendants should be heard and carefully analyzed by the competent administrative agencies and courts. So should they be under Costa Rican competition law. The price provision of article 11 is not a blunt statement which accepts no tests.⁶¹ In general terms, the dicta in the landmark case of *Chicago Board of Trade v. United States*⁶² ought to be followed: "The true test of legality is whether the restraint imposed merely regulates and perhaps promotes competition or whether it may suppress or even destroy competition."⁶³

2. The Exchange of Information Provision:

Under Costa Rican competition law, in order for an exchange of information among competitors to be illegal, it must have the purpose or consequence of fixing prices.⁶⁴ In other words, the exchange of

59. *Id.* at 120.

60. *United States v. Brown Univ.*, 5 F.3d 658 (1993). The eight Ivy League schools include Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, Princeton University, the University of Pennsylvania, and Yale University.

61. P.C.D.E.C. art. 11 (Costa Rica).

62. *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

63. *Id.* at 238. The case also provides guidance in specific terms:

To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and the purpose or end sought to be attained, are all relevant factors.

Id.

64. P.C.D.E.C. art. 11 (Costa Rica).

information would be the instrument materializing or facilitating an agreement to fix prices or intending to do so.

United States treatment of this issue coincides with the Costa Rican approach, that is, exchanges of information which materialize or facilitate an agreement are illegal.⁶⁵ However, an important caveat is required here: United States treatment of this issue is more ample than Costa Rican competition law inasmuch as it is not restricted to price fixing agreements.⁶⁶

a. Exchanges of Information Materializing Agreements.

In both *Eastern States* and *Cement Manufacturers Protective Association v. United States*, the issue was whether the analyzed circulation of information was illegal or whether it, in fact, constituted an agreement not to deal.⁶⁷ Although neither case deals with price fixing, the analyses made could be helpful in determining whether the exchange of information was material to the illegality.

In *Eastern States*, by concerted action, the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the association.⁶⁸ A retailer's decision not to purchase was not independent; it was the product of an agreement materialized in the circulated list of offenders.⁶⁹ Hence, the list was not illegal. The agreement not to deal derived from its circulation.⁷⁰

On the other hand, in *Cement Manufacturers*, the trade association members exchanged information on the credit of purchasers and on specific job contracts.⁷¹ The information simply indicated whose accounts were overdue.⁷² Here, the information circulated was not illegal; neither was the refusal of the association members to deal with delinquent purchasers.⁷³ In short, the exchange of information did not create an illegal agreement.⁷⁴

65. P.C.D.E.C. art. 11 (Costa Rica); Sherman Antitrust Act, 15 U.S.C. § 1 (1890).

66. Sherman Antitrust Act, 15 U.S.C. § 1 (1890).

67. *Eastern States Retail Lumber Ass'n v. United States*, 234 U.S. 600, 601 (1914).
Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925).

68. *Eastern States*, 234 U.S. at 608.

69. *Id.* at 609.

70. *Id.*

71. *Cement Mfrs.*, 268 U.S. at 591.

72. *Id.* at 599.

73. *Id.* at 604.

74. *Id.*

b. Exchanges of Information Facilitating Agreements

Exchanging of information in itself is not illegal.⁷⁵ In *Maple Flooring Manufacturers Association v. United States*, the Supreme Court examined the gathering, computation, and distribution among the members of the association of the average cost to association members of all dimensions and grades of flooring, freight rates for flooring, as well as quantities and quality of flooring sold and prices received.⁷⁶

The Court held that the evidence did not establish price uniformity across the industry or that substantial uniformity had resulted from the activities of the association.⁷⁷ Furthermore, the Court held that, "[n]or was there any direct proof that the activities of the Association had affected prices adversely to consumers"⁷⁸

In order for an exchange of information to be illegal, that is, to facilitate an agreement, an effect on output and prices is required.⁷⁹ In *American Column & Lumber Co. v. United States*, the Court analyzed petitioners' entering upon an "Open Competition Plan."⁸⁰ The plan allowed, "extensive interchange of reports, supplemented as it was by monthly meetings at which an opportunity was afforded for discussion "of all subjects of interest to the members"⁸¹

The Court found that the members of the Plan began actively to cooperate, through meetings, to suppress competition by restricting production. Read. The minutes of a meeting held by the Plan's members. "If there is no increase in production, particularly in oak, there is going to be good business No man is safe in increasing his production. If he does, he will be in bad shape, as demand won't come."⁸² Thus, the Plan did affect output and prices.

In *United States v. Container Corp. of America*, there was not much controversy among the Justices regarding the interpretation of applicable law to the facts, the burden of proof rested with the plaintiffs.

⁷⁵ P.C.D.E.C. art. 11 (Costa Rica).

⁷⁶ *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925).

⁷⁷ *Id.* at 567.

⁷⁸ *Id.* at 567.

⁷⁹ *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921) (Holmes, Brandeis, and McKenna, JJ., dissenting).

⁸⁰ *Id.* at 393. The plan stated: "Knowledge regarding prices actually made is all that is necessary to keep prices at reasonably stable and normal levels There is no agreement to follow the practice of others, although members do naturally follow their most intelligent competitors, if they know what these competitors have been actually doing" *Id.*

⁸¹ *Id.*

⁸² *Id.* at 402.

Therefore, two conclusions may now be reached:⁸³ under both United States and Costa Rican law, exchanges of information, are not illegal.⁸⁴ Plaintiffs must provide evidence to establish that the actual exchange of information materialized, facilitated, or was intended to materialize or to facilitate an agreement, thereby having an effect on production and prices. Under Costa Rican law, however, as established under part "b" above, the materialized agreement being a tacit one, the antitrust enforcement authorities would additionally: a) require proof as to its actual existence (minutes of meetings, telephone conversations, exchange of documents to the effect, etc.); and b) need to establish that economic conditions favorable for the existence of such an agreement existed (because in their absence, the existence of an agreement to collude is very unlikely).⁸⁵ Under Costa Rican competition law article 11, only exchanges of information materializing or facilitating (or intending to do so) price fixing agreements are illegal. Exchanges of information directed to any other type of agreement among competitors are excluded.⁸⁶

III. ARTICLE TEN: HORIZONTAL RESTRAINTS ARE ALWAYS SUBJECT TO THE RULE OF REASON DOCTRINE

Article ten general prohibitions: public, private monopolies and monopolistic practices *that* hinder or limit competition or the access of competitors to the market *or that* exclude competitors from the market are prohibited and must be sanctioned according to articles twenty-four, twenty-five and twenty-six of this law, with the exceptions set forth under article nine of this law⁸⁷ (emphasis added).

The discussion of which restrictive business practices should be analyzed under the so-called rule of reason or, on the contrary, which practices are a *per se* violation of the antitrust laws, have filled up a

83. *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969).

84. P.C.D.E.C. art. 11 (Costa Rica); Sherman Antitrust Act, 15 U.S.C. § 1 (1890).

85. POSNER, *supra* note 24, at 140, considers that in *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), from an economic standpoint, there was no evidence of a price fixing agreement because there were no economic conditions favorable for the existence of such agreement. In fact he considers that the circumstances - a very low level of concentration in the industry - were extraordinarily unpropitious for collusion and that it was very unlikely that the hardware manufacturers could collude effectively without explicit price fixing. Possible explanations for the exchange of information were provided by Justice Brandeis in his dissenting opinion. Posner finds those explanations convincing. The dissenters in this decision dominated the *Maple Flooring* dicta four years later.

86. P.C.D.E.C. art. 11 (Costa Rica).

87. P.C.D.E.C. art. 10 (Costa Rica).

substantial amount of pages of the more than one hundred year old case law history in the United States.

In general, in order for conduct to be illegal it has to be unauthorized or against the law.⁸⁸ Specifically, *per se* violations of the antitrust law are considered inherently anti-competitive and injurious to the public without any need to determine if it actually *injured* market competition.⁸⁹ In accordance with the *per se* doctrine, courts need not inquire into the *reasonableness* of a conduct before determining that it is a violation of the antitrust laws.⁹⁰ Thus, for instance, in *United States v. Socony-Vacuum Oil Co.*,⁹¹ regarding *per se* price fixing the Supreme Court stated:

The reasonableness of prices has no constancy due to the dynamic quality of the business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those price would not be subject to continuous administrative supervision and readjustment in light of changed conditions. . . . Congress has not left us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. . . . [P]rice-fixing combinations which lack Congressional sanction are illegal *per se*; they are evaluated in terms of their purpose, aim or effect in the elimination of so-called competitive evils.⁹²

Therefore, if a conduct is *per se* illegal, no analysis should be required as to whether it is reasonable, justified, or injurious. *Contrario sensu*, a conduct is not *per se* illegal and subject to the rule of reason, if an analysis is indeed required.

Nevertheless, from the actual analyses made by the Supreme Court during the 1970s and 1980s, one draws the conclusion that a rule of reason analysis is always required. Courts actually analyze whether justifications exist an agreement among competitors who fix prices; they determine whether price fixing agreements are reasonable or ancillary; and they examine whether competition is enhanced rather than restricted.⁹³ This

88. BLACK'S LAW DICTIONARY 747 (6th ed. 1990) (defining the word illegal).

89. *Id.* at 1142.

90. *Id.*

91. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

92. *Id.* at 218, 221, 228.

93. *Broadcast Music v. Columbia Broadcast Sys.*, 441 U.S. 1, 23, 24 (1979).

conclusion is expressly confirmed by the landmark *Broadcast Music* case.⁹⁴ In the specific case of Costa Rican competition law, article 10, General Prohibitions, provides the general threshold requirement. Article 10 directs a rule of reasoned analysis in all cases reviewed under Costa Rican competition law, whether a complaint is filed by a private party or is brought *ex officio*; whether it is an absolute monopolistic practice (horizontal restraints of trade) under article 11 or a relative monopolistic practice (vertical restraints of trade) under article 12; or whether it is a merger or acquisition under article 16.⁹⁵

In *National Society of Professional Engineers v. United States*⁹⁶, the Court reviewed and summarized the rule of reason doctrine.⁹⁷ The Court analyzed the facts in light of the doctrine and concluded that the doctrine did not apply to the facts.⁹⁸ Thus, the Court did not decide that the conduct was illegal until it had analyzed the doctrine and the facts.

Furthermore, in both *Broadcast Music* and *NCAA*, the Court found price fixing to exist, yet exempted it from antitrust *per se* liability.⁹⁹ If price fixing, the most condemned horizontal restraint of trade could be reasonably justified, then the inevitable conclusion is that horizontal restraints are no longer *per se* illegal.

In *Broadcast Music*, the Court expressly stated: "Not all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints."¹⁰⁰ Additionally, Judge Bork in *Rothery Storage & Van Co. v. Atlas Van Lines*, established that, "[i]n [*Broadcast Music*], [*NCAA*], and *Pacific Stationary*, the Supreme Court returned to the law to the formulation of [*Addyston Pipe & Steel*] and thus effectively overruled [*Topco*] and [*Sealy*] as to the *per se* illegality of all horizontal restraints." (emphasis added).¹⁰¹

⁹⁴ *Id.*

⁹⁵ P.C.D.E.C. arts. 11, 12, 16 (Costa Rica).

⁹⁶ *National Soc'y of Prof'l Engr's v. United States*, 435 U.S. 679 (1978).

⁹⁷ The Court traces the following path: *Mitchel v. Reynolds* 1 P. Wms 181, 24 Eng. Rep. 347 (1711); *Joint Traffic Assn.* (direct/indirect test), 171 U.S.; then Circuit Judge William H. Taft's *United States v. Addyston Pipe & Steel Co.* (ancillary test), 85 F. 271 (6th Cir. 1898), affirmed, 175 U.S. 211 (1899); *Standard Oil* (naming the doctrine), 221 U.S. 1, 60, 64-65, 68 (1911); *Chicago Bd. of Trade v. United States*, (pro-competitive effects test).

⁹⁸ *National Soc'y of Prof'l Engr's*, 435 U.S. at 696.

⁹⁹ *Broadcast Music v. Columbia Broadcast Sys.*, 441 U.S. 1, 24-25 (1979); *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984).

¹⁰⁰ *Broadcast Music*, 441 U.S. at 23.

¹⁰¹ *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 277, 229 (D.C. Cir. 1986).

Hence, not all horizontal restraints are *per se* illegal. The syllogism is very straight forward: under the *per se* doctrine, no analysis is required as to the reasonableness or justifiability of the conduct in order to determine its illegality; and under a rule of reason, such analysis is indeed required. Courts need to determine (and actually do) the [un]reasonableness of a horizontal restraint before establishing its legality or illegality. Then, horizontal restraints are not *per se* illegal and, hence, are subject to the rule of reason doctrine.

Furthermore, in the case of the Costa Rican law, every restraint of trade examined under the competition statute has to comply with the above quoted general threshold of article 10 and is subject to a rule of reason analysis.¹⁰²

When examining the factual circumstances, article 10 requires the determination that certain results exist: hindering or limiting competition; the access of competitors to the market; or excluding competitors from the market.¹⁰³ This requirement amounts to a test of reasonableness which is more strict than the one required in the United States, and, hence, to a full rule of reason.

IV. ARTICLE SIXTEEN: MERGERS

Article 16: Concentration is understood as the merger, acquisition of control, or any other action in virtue of which corporations, stock, trusts, or assets in general are concentrated, as long as it occurs among competitors, suppliers, clients, or other economic agents with the purpose or consequence of diminishing, damaging, or hindering competition or the free availability of similar goods and services or others substantially related.

In the investigation of concentrations, the criteria for measuring the substantial power over a relevant market shall be taken into account, as determined by this law. Article 16 of the Costa Rican law, the letter and application of section 7 of the Clayton Act of 1914 (as reformed in 1950 and in 1980) and the 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (the Guidelines) will be the legal provisions reviewed under this section.

Although in many respects in the United States the treatment of mergers has differed from the 1960s to the 1990s, the issues involved in such treatment have not: definition of relevant market, definition and the

102. P.C.D.E.C. art. 10 (Costa Rica).

103. P.C.D.E.C. art. 10 (Costa Rica).

verification of market power, ease of entry to a market, and interpretation of the effects clause.

The Warren Court defined the rules in *Brown Shoe Co. v. United States* (*Brown Shoe*),¹⁰⁴ in *United States v. Philadelphia National Bank* (*Philadelphia Bank*),¹⁰⁵ and in *United States v. Von's Grocery Company* (*Von's*).¹⁰⁶ In all three cases, the Court ruled for the plaintiffs. However, in 1974 the approach radically changed with *United States v. General Dynamics Corporation* (*General Dynamics*).¹⁰⁷

Article 16, which must be read in conjunction with articles 14 (relevant market) and 15 (market power), though lacking the most fortunate Spanish syntactic, takes a very adequate approach. A substantial market power is required.¹⁰⁸ For the determination of market and market power, all criteria deemed conducive to such determination is allowed. Substantial market is not sufficient for an article 16 illegality; intent to monopolize is also required. No presumption of intent or of "likeliness to substantially lessen competition" may be drawn from sole market power.¹⁰⁹ Article 16 applies only to competitors acting among themselves. Only corporations are covered by the statute. That is, physical persons are excluded from its scope¹¹⁰ and joint ventures are excluded from its scope.¹¹¹

The following is a summary of the most important issues regarding the examination of mergers under United States and Costa Rican competition law. In general, Costa Rican law is consistent with the more lenient trend that the United States has more recently experienced.

A. The Definition of Market

The narrower the market is defined, the stronger the market power any single company has in the market. Plaintiffs want to define market narrowly, while defendants want to define market broadly. To measure a market, two elements need be taken into account: the product market and the geographic market.

104. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

105. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

106. *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966) (Stewart, J. strongly dissented).

107. *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). The opinion was written by Justice Stewart, the strong dissenter in *Von's Grocery Co.*

108. P.C.D.E.C. art. 15 (Costa Rica).

109. P.C.D.E.C. art. 16 (Costa Rica).

110. P.C.D.E.C. art. 16 (Costa Rica).

111. P.C.D.E.C. art. 16 (Costa Rica).

In *Brown Shoe* the two above mentioned elements were examined.¹¹² Product market was defined as men's, women's, and children's shoes.¹¹³ Geographic markets were delineated as "cities with a population exceeding 10,000 and the environs in which [the merging parties] retailed shoes through their own outlets."¹¹⁴ The Guidelines refer to both elements. Although neither article 16 nor 14 expressly draw this distinction between product and geographic markets, the distinction may prove useful and available.

Regarding the product market, product substitution is an essential concept. In *United States v. E.I. du Pont De Nemours & Co.*,¹¹⁵ the Court specifically addressed the issue. The Court found that a "very considerable degree of functional interchangeability" existed between cellophane and other products.¹¹⁶ It took into consideration the "cross-elasticity of demand."¹¹⁷ Thus, it defined the product market as the "flexible packaging material market," rather than limiting it to the cellophane market, *strictu sensu*, as the government had advanced.¹¹⁸ Article 14 includes the element of product substitution.¹¹⁹

In addition, probable supply responses should be considered in defining the product market. Firms not currently producing or selling the relevant product that are likely to respond and enter the relevant market "within one year and without the expenditure of significant sunk costs of entry and exit in response to a small but significant and nontransitory price increase"¹²⁰ should be included when calculating product substitution. Article 14 allows the reading of probable supply responses into the determination of the relevant market.¹²¹

Regarding the geographic market, supply from imports is crucial. In *United States v. Aluminium Co. of America (Alcoa)*, the outcome of the case shifted because of imports (production abroad) being included in the relevant geographic market definition.¹²² The Court stated: "The case at bar is however different, because, for ought that appears there may well

112. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

113. *Id.* at 327.

114. *Id.* at 339.

115. *United States v. E.I. du Pont De Nemours*, 351 U.S. 377 (1956).

116. *Id.* at 399.

117. *Id.* at 400.

118. *Id.* at 400.

119. P.C.D.E.C. art. 14 (Costa Rica).

120. P.C.D.E.C. art. 14 (Costa Rica).

121. P.C.D.E.C. art. 14 (Costa Rica).

122. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

have been a practically unlimited supply of imports as the price of ingot rose. . . . [H]ad [Alcoa] . . . raised its prices, more ingot would have been imported."¹²³ The possibility of including supply from imports may be validly read into article 14 of the Costa Rican competition law.

In general, all elements included in United States statutory and case law for the determination of the relevant market may be found in Costa Rican competition law.

B. The Existence of Market Power

Merger cases ask whether combining two firms will create new market power. "But one must remember that market power does not itself create liability; it is, at most, a threshold requirement that must be satisfied before liability can be imposed."¹²⁴ In *General Dynamics*,¹²⁵ the Supreme Court reached back to *Brown Shoe*¹²⁶ for the proposition that while market-share percentages are "the primary indexes of market power - its structure, history and probable future - can provide the appropriate setting for judging the probable anticompetitive effect of the merger."¹²⁷

Power to control prices or to exclude competition is the sort of market power that Courts are after. The following factors should be considered in determining whether two merging firms will acquire market power as to control prices or to exclude competition:

- a. Market share: It is only one basis for inferring market power. Market share is a proportion: the denominator is the market which is determined as stated previously and expressed in dollars of sales; the numerator is the sales volume in that market. However, the ability to charge more than the competitive price still has to be determined.¹²⁸
- b. Direct measurement: If costs plus profits equal price, then profits equal price minus costs. By determining profits it may be determined whether they exceed the normal competitive equilibrium industry

123. *Id.*

124. AREEDA & KAPLOW, *supra* note 1, at 582.

125. *See* United States v. General Dynamics Corp., 415 U.S. 486, (1974).

126. *See* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

127. *Id.* at 322 n.38.

128. POSNER, *supra* note 24, at 112, considers that "[t]he revisions in our thinking about mergers calls for conservative rules of liability." He further contends that "[t]here is little basis in current thinking for automatic intervention in markets in which the four largest firms have a combined market share less than 60 percent." *Id.*

return.¹²⁹ Nevertheless, the calculation of costs is often a very difficult one.

- c. Conduct of the merging parties: For example, sustained below-cost pricing that cannot be otherwise explained.¹³⁰
- d. Elasticity of demand: The responsiveness of consumers to changes in a product's price. If it is inelastic, it is likely that there is market power.¹³¹
- e. Supply substitution and entry: This element is complementary to the concept of elasticity of demand. It is not sufficient to know whether consumers will respond to changes in price, it is also necessary to know whether competitors (currently producing the item or who may shortly enter the market) can respond to changes in price, that is, whether they are able to expand their output in response to a price increase by a competitor with a high market share.¹³²

Article 15 of the Costa Rican competition law allows the use of all of the above mentioned elements.

C. *The Effects Clause*

Plain raw market power to unduly restrain competition is not illegal under United States or Costa Rican competition law. Section 7 of the Clayton Act forbids only those mergers that may substantially lessen competition or tend to create a monopoly.¹³³ Article 16 prohibits mergers and acquisitions which have "the purpose or consequence of diminishing, damaging or hindering competition or the free availability of similar goods and services or others substantially related."¹³⁴

While United States law requires a substantial possibility that the merger restricts competition, Costa Rican law's threshold is whether the merger actually restricts competition or has the intention to do so. The Warren Court cases cited above were rather severe in favor of plaintiffs and against mergers, thereby admitting assumptions on the existence of undue restraints to competition. In *Philadelphia Bank*, for instance, the Court found that:

129. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, (2d Cir. 1945). A profit analysis is used there.

130. *Id.*

131. *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332 (1982).

132. *United States v. General Dynamics Corp.*, 415 U.S. 486, 494-96 (1974).

133. Clayton Act, 15 U.S.C. § 7 (1914), *as amended* Robinson-Patman Act, 15 U.S.C. § 13 (1936).

134. P.C.D.E.C. art. 16 (Costa Rica).

a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effect. . . .¹³⁵

No assumptions can be read into Costa Rican law for two reasons. Firstly, the language of article 16, as opposed to section 7 of the Clayton Act, requires a specific result or intent, which has to be proven accordingly. No possibilities of undue restraints, as opposed to section 7 meet the threshold.¹³⁶ Second, the trends shown in the cases examined by the Court in the 1970s and in the Guidelines and in its application by the Federal Trade Commission¹³⁷ indicates that the operation of such assumptions was not positive.¹³⁸

Moreover, New York University's Professor of Law, Eleanor Fox, applied the guidelines, as promulgated in 1982, before the 1984 and 1992 amendments made them even more hospitable to mergers. She reached the conclusion that the government probably would not have sued in *Brown Shoe*, *Alcoa*, *Von's*, and *General Dynamics*.¹³⁹ Furthermore, in general, the mergers challenged by the government between 1963 and 1978 were not anti-competitive.¹⁴⁰ Finally, after the 1992 Guidelines, merger values in 1994 and in 1995 were record highs, with \$ 347.1 billion and \$ 363.00 billion, respectively.¹⁴¹

In sum, article 16 requires that an undue restraint of competition be caused or intended. Recent application of the Guidelines may provide clarity in the interpretation of article 16.¹⁴² In addition, the application of United States competition law in the 1960s, a practice of being too strict

135. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963).

136. P.C.D.E.C. art. 16 (Costa Rica).

137. The Federal Trade Commission enforces the antitrust laws.

138. United States v. General Dynamics Corp., 415 U.S. 486 (1974).

139. Eleanor Fox, *The New Merger Guidelines: A Blue Print for Microeconomic Analysis*, 27 ANTITRUST 519, 590-91 (1982). See also AREEDA & KAPLOW, *supra* note 1, at 877.

140. Espen B. Ekbo & Peggy Wier, *Antimerger Policy under the Hart-Scott-Rodino Act: A Reexamination of the Market-Power Hypothesis*, in THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE 147 (Fred McChesney et al.).

141. N.Y. TIMES, Nov. 7, 1995, at D1.

142. The Guidelines were promulgated by the Justice Department and used in analyzing mergers.

on mergers and too lenient on plaintiffs, should not be used as guiding principles.

D. Mergers and Acquisitions Covered Under Article 16

Section 7, Clayton Act provides:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly. . . .¹⁴³

After comparing the texts of section 7 and article 16, the following conclusions may be reached regarding the types of mergers and acquisitions included in article 16:

- a. Article 16 includes acquisitions by physical persons. Before the 1950 amendment, section 7 referred only to corporations.
- b. Article 16 includes the acquisition of assets. Before the 1950 amendment, section 7 referred only to stock.
- c. Article 16 excludes the acquisition of assets by an economic agent from a non-economic agent. For instance, the owner of a mine may legally purchase a cattle ranch which is rich in minerals.
- d. Article 16 does not provide for a pre-merger notification and approval procedure similar to one required by the Hart-Scott-Rodino Act of 1976. Such a procedure would be very convenient and advisable.
- e. The wording of article 16 does not include the idea that eliminating a potential competitor may be a basis of antitrust violation. The potential-competition doctrine was applied by the Supreme Court in *Federal Trade Commission v. Procter & Gamble Co. (Clorox)*.¹⁴⁴ Richard Posner is correct in considering that, in any case, the Court has not applied the concept of potential competition very well and that the essential problem is the impossibility of developing workable rules of illegality in this area:

143. Clayton Act, 15 U.S.C. § 7 (1914), as amended Robinson-Patman Act, 15 U.S.C. § 13 (1936).

144. *Federal Trade Comm'n v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

There is no practical method of ranking even crudely, the potential competitors in a market for the purpose of identifying a set of most likely or most feared entrants. And even if one could identify such a set through the methods of litigation, one would not know how to evaluate the elimination of one of its members The doctrine of potential competition was introduced into antitrust law by the Supreme Court, and the Court can abandon it - and should do so [T]he elimination of an individual potential competitor can be expected to have no competitive significance at all, since there are presumably a number of equally potential competitors - firms that could enter the market at a cost no higher than that of the eliminated firm and would do so if the market price were appreciably higher than the competitive level. There may be cases in which this presumption could be rebutted if only we knew how to measure the entry costs of different firms or to determine reliably the perceptions of the firms in the market. We can do neither of these things, so that if the government were required to prove as a matter of fact that the elimination of a given competitor altered the structure of competition, it would always fail.¹⁴⁵

V. MONOPOLY AND MONOPOLIZATION

Under both United States and Costa Rican competition law, not every oligopoly and by extension, not every monopoly is illegal. Not every oligopoly monopoly unduly restricts competition. Neither law sanctions oligopolies monopolies solely for the reason that they are oligopolies monopolies.

While section 2 of the Sherman Antitrust Act provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony"¹⁴⁶ Costa Rican competition law does not even have a similar provision forbidding monopolization or the attempt to monopolize.

145. POSNER, *supra* note 24, at 122.

146. Sherman Antitrust Act, 15 U.S.C. § 2 (1890).

Costa Rican competition law, however, does have the general threshold requirement of article 10.¹⁴⁷ In accordance with that provision, only oligopolies that hinder or limit competition, that hinder or limit the entry of competitors, or that force the exit of competitors from the market are to be sanctioned.¹⁴⁸

In virtue of the lack of a similar provision to section 2, Costa Rican law does not forbid monopolies or monopolization. Nevertheless, even if Costa Rican competition law provided a regulation such as section 2 of the Sherman Act, due to the *sine qua non* requirements of article 10, it would not sanction monopolies that do not unduly restrict competition. That is, it would not sanction oligopolies and monopolies solely for the reason that they are oligopolies (monopolies).

The following is a brief analysis of the interpretation and application of Section 2 of the Sherman Act. Its purpose is to establish that in general antitrust theory monopolies that do not unduly restrain competition are not illegal.

Standard Oil Co. v. United States,¹⁴⁹ *United States v. American Tobacco Co.*¹⁵⁰ and *United States v. American Can Co.*¹⁵¹ represent the early landmark cases in monopolization. In each of these cases the Court found that, in addition to market power, reprehensible conduct in attaining or keeping such power was also required.¹⁵²

In *Standard Oil*, the Court ruled that the defendant's many acquisitions and mergers gave rise

in the absence of countervailing circumstances . . . to the prima facie presumption of intent and purpose to maintain the dominance over the oil industry, not as a result of normal methods of industrial development, but by new means of combination . . . with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of

147. P.C.D.E.C. art. 10 (Costa Rica).

148. *Id.*

149. *Standard Oil Co. v. United States*, 221 U.S. 1, 55, 61-62, 75 (1911).

150. *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

151. *United States v. American Can Co.*, 230 F. 859, 901-902 (D. Md. 1916), *appeal dismissed*, 256 U.S. 706 (1921).

152. *Standard Oil*, 221 U.S. at 55, 61-62, 75; *American Tobacco*, 328 U.S. at 781; *American Can*, 230 F. at 901-902.

petroleum and its products in the channels of interstate commerce. . . .¹⁵³

In *American Tobacco*, the Court found that

the acts ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competition out of the business or compelling them to become parties to a combination. . . .¹⁵⁴

In *American Can*, the Court specifically addressed the issue of size vis a vis illegality:

[Congress] has not accepted the suggestion of some influential men that the control of a certain percentage of industry should be penalized. It has not yet been willing to go far in the way of regulating and controlling corporations merely because they are large and powerful, perhaps because many people have always felt that government control is in itself an evil, and to be avoided whenever it is not absolutely required for the prevention of a greater wrong.¹⁵⁵

However, the 1945 *Alcoa* decision¹⁵⁶ unnecessarily created confusion by enlarging the scope of "exclusionary acts."¹⁵⁷ The decision suggests, using the words of District Court Judge Wyzanski in *United States v. United Shoe Machinery Corp.*,¹⁵⁸ "that one who has acquired an overwhelming share of the market monopolizes whenever he does business, apparently even if there is no showing that his business involves

153. *Standard Oil*, 221 U.S. at 75.

154. *American Tobacco*, 328 U.S. at 781.

155. *American Can*, 230 F. at 902.

156. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, (2d Cir. 1945).

157. The confusion was unnecessary because, first, the Court verified that size does not determine guilt; that there must be some 'exclusion' of competitors; that the growth must be something else than "natural" or 'normal', that there must be a "wrongful intent", or some other specific intent; or that some 'unduly' coercive means must be used", and, second, because the Court found that *Alcoa's* "size not only offered it an 'opportunity for abuse', but it utilized its size for abuse.

Id.

158. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

any exclusionary practice.”¹⁵⁹ The *Alcoa* Court ruled that there “is no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.”¹⁶⁰

District Court Judge Wyzanski in *United Shoe* who clarified Justice Hand’s dicta in *Alcoa* by reiterating that, in accordance with Justice Hand himself, there is antitrust liability if the monopoly is not owed to superior skill, superior products, natural advantages (including accessibility to raw materials or markets), economic or technological efficiency (including scientific research), low margins of profit maintained permanently and without discrimination, or licenses conferred by, and used within, the limits of law (including patents on one’s own inventions, or franchises granted directly to the enterprise by a public authority).¹⁶¹

Thus, a line should be drawn between business acts which are exclusionary and business acts which are just aggressive business acts. Good competition does not mean soft competition. Good competition entails aggressive acts which are not exclusionary, which, for instance, do not meet the criteria of article 10 of the Costa Rican competition law¹⁶² or are not of the nature of the acts included under section 1 of the Sherman Act.

Hence, section 2 of the Sherman Act requires the presence of monopoly in the form of market power and the exercise of such market power with the purpose of attaining or maintaining monopoly. Costa Rican competition law does not forbid the existence of monopoly even if coupled with exclusionary acts. If it did, the generally required threshold of article 10 would have to be met. That is, exclusionary acts would have to be present.

159. *Id.* at 295.

160. *Aluminum Co.*, 148 F.2d at 416.

161. *Id.* at 416.

162. Article 10 sanctions acts which hinder or limit competition, those which hinder or limit the entry of competitors, or those that force their exit from the market.